No. 80-420

In The

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a *prima facie* case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the *prima facie* showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness's testimony, contrary to a well-established rule of review, deny the defendant equal protection of the law?

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ARGUMENT

I

In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed.

The brief submitted by the State of Ohio concentrates on the history of discriminatory prosecution, with a listing of cases in which the defense has been denied, rather than an application of the law of selective enforcement to the specific facts of this case. However, this lengthy discussion on the general topic fails to support an argument that the Supreme Court of Ohio ruled correctly. Therefore, in this reply brief, petitioners will concentrate primarily upon answering arguments made by the United States as *amicus curiae*, and where necessary, respond to certain claims made by respondent, State of Ohio.

Not a Test Case

Petitioners are confident that once this Court reviews the record, it will be convinced that they met both prongs of the test to establish illegal discriminatory prosecution in that (1) others similarly situated were not prosecuted for conduct similar to that for which petitioners were charged and further, that no steps, preliminary or otherwise, were taken to initiate obscenity charges against any publication other than *Hustler;* and (2) the *Hustler* prosecution was admittedly commenced because of adverse public reaction to a cartoon or indeed to the entire magazine itself.

As does the United States (*see infra*) respondent attempts to justify the prosecutor's illegal selection of *Hustler* alone on the ground that it was to be a test case for the City of Cleveland. No such conclusion of a test case can be drawn from the present record where not only did petitioners prove that there were no other similar publications under consideration by the prosecutor's office, they adduced evidence that the Assistant Law Director had made no preparation whatsoever for any subsequent prosecutions following the resolution of the purported test case. For example, the Assistant Law Director had not compiled a list of titles, business establishments, files, or taken any other steps which would lead one to genuinely believe

that the *Hustler* case was not going to be the first *and last* prosecution of a mens-sophisticate magazine with second-class mailing privileges. In supporting the choice of *Hustler* as the sole publication to prosecute, the state questions "[w]ould it truly matter to the First Amendment freedoms of speaking one's mind whether 'Hustler' goes first, or whether 'Hustler' and 'Penthouse', 'Swank' or another go first together?" (Respondent's Brief at 31, 32). Curiously, from this statement it would seem as if the city prosecutor had an entire list of other magazines to prosecute, following a successful *Hustler* test case. The proof, however, is to the contrary, in that there were no other prosecutions in any way even preliminarily contemplated and none have been initiated within the four years since the hearing (Respondent's Brief at 79).

In keeping with its unsupportable test-case claim, respondent argues that "[i]n Cleveland, all of the 'adult' theatres and bookstores were continually charged and the effort to broaden the scope of enforcement into the 'drugstore porn' industry is more in keeping with equal enforcement than a violation of equal protection" (Respondent's Brief at 56). However, no proof whatsoever exists on the present record as to respondent's claim of such enforcement. Moreover, Ohio's reliance upon the activities of the New York City Midtown Task Force is misplaced for that prosecuting agency concentrated on all sex-related establishments, instead of singling out just one, as did the Assistant Law Director in this case when he chose to prosecute *Hustler*. Contrary to respondent's statement (Respondent's Brief at 73), the trial court did not reject the test case rationale as part of the law of discriminatory prosecution. Rather, the trial judge merely rejected respondent's bogus claim that *Hustler* was a test case.

Petitioners must disagree with respondent's reason as to why *Hustler* remains — four years later — the only case of its type pending: "our firm belief that extraditing owners from across

the country or charging a few local merchants would be more unfair than establishing the limits of Cleveland's community standards with 'Hustler' " (Respondent's Brief at 79). On the contrary, Cleveland's apparent neglect of other magazines similar to *Hustler* proves that the prosecution has no intention of charging these other similar magazines and belies respondent's claim that the *Hustler* prosecution is a test case. Indeed, the failure to even purchase other magazines or prepare files on them indicates the absence of the City's intention to establish the community standards of Cleveland with the *Hustler* prosecution, and more correctly, its eleventh hour decision to seek sanctuary from dismissal by making a hollow test-case claim. Similarly, none of the arguments made by the United States in its *amicus* brief in favor of *Hustler*'s being a test case is any more compelling.*

Test Case Argument of *Amicus Curiae*

The United States relies heavily upon the Assistant Law Director's own testimony that the prosecution of petitioners for publishing *Hustler* is a test case. At page 7 of its brief, *amicus*

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*The United States maintains "that there is a substantial question regarding the Court's jurisdiction to hear this case" (Brief for the United States at 1). However, it is beyond question that this case deserves immediate attention from the Court for several reasons. First, the interests of certain defendants, who are currently awaiting prosecution and who arguably have been singled out for such prosecution because of their unpopular views or non-conformist activities, could be adversely affected in having to await the outcome of petitioners' trial in the absence of this Court's definitive statement on the issue of selective prosecution at this time. Moreover, since we are dealing here with selective prosecution vis-a-vis First Amendment expression, the chill on those who would speak, write, publish, or disseminate controversial ideas but refrain from doing so for fear that they may be the object of a prosecutor's unbridled, but as yet not definitely illegal, discretion is more than ample reason for this Court's consideration. Thus, these vital questions concerning the prosecutor's role deserve the immediate attention of this Court, which has jurisdiction to hear the case.

curiae states that this "prosecutor candidly admitted that this prosecution was a test case . . . ." The Government would want this Court to believe that the prosecutor's statement was a concession on some vital point. On the contrary, any such statement by the Assistant Law Director is self-serving because it is in Ohio's own interest to argue that the prosecution is a test case. Indeed, if the charges lodged against petitioners by the State of Ohio were not motivated by the test-case rationale, there is no legitimate explanation other than selective prosecution for respondent's action in charging *Hustler*.

More importantly, however, the proof is at odds with the last minute test-case claim, and indeed, the prosecutor was unable to adduce any corroborating evidence other than his own testimony, to support the nebulous claim of a test-case basis for instituting the prosecution. Not only were no "similar prosecutions [held] in abeyance" (Brief for the United States at 14), the Cleveland prosecutor's office had taken no steps to prepare for the cases that would necessarily follow the *Hustler* test case, if in fact it truly were a test case. For example, the Assistant Law Director had made no arrangements to identify other alleged offenders, purchase evidence, ascertain the places of business of the alleged offenders and determine if their publishers, if not in Ohio, could be extradited to the state.

We do not necessarily challenge a prosecutor's discretion in choosing to focus on one offender and designate that prosecution a test case. What is indefensible is for one in the position of the Assistant Law Director to state, when his actions and those of the police are to the contrary, that a prosecution, such as the present one, challenged on equal protection grounds, is merely the first of a series of several as yet to be announced obscenity prosecutions. It is merely too convenient for one apparently charged with the discretion to initiate prosecutions, to state that if the instant case is successful, he will commence other criminal suits, especially when *no* steps in this direction

have begun. Yet the Assistant Law Director maintains that the decision as to future prosecutions of other publications was yet to be made by his superiors. Clearly, then, it was not for one prosecutor alone to testify that the *Hustler* prosecution was a test case once the petitioners had demonstrated that it was the *only* case and that *no* others were being worked up. Therefore, once the petitioners made the initial showing, it was incumbent upon the Assistant Law Director to call his superiors to present proof that if the *Hustler* prosecution was successful, other cases would immediately follow. The absence of any evidence that *Hustler* was a test case mandates a finding that the state did not rebut petitioner's showing that *Hustler* was impermissibly singled out over countless similar alleged violators of the obscenity laws.

Illegal Prosecutorial Motivation

A thorough review of the record of the February 28, 1977 hearing reveals that the Assistant Law Director's testimony wavered considerably as to whether or not charges were initiated against petitioners due to citizen disapproval of a constitutionally protected cartoon. The trial judge was witness to Mr. Taylor's statements, and in dismissing the charges, he necessarily credited that portion of Mr. Taylor's testimony which attributed the prosecution of petitioners to community disapproval of their publication. Thus, contrary to the Government's claim (Brief for the United States at 20), the evidence was *not* uncontradicted that the prosecution was not based on reaction to the political cartoon.

The United States urges that citizens mailing copies of a *Hustler* issue to the pornography unit of the Cleveland Police Department was a justifiable basis for the prosecutor's decision to charge petitioners. Of course, the behavior of the police in acting upon these citizen complaints by taking the magazine to the prosecutor and recommending prosecution must be at-

tributed to the state. The United States concedes that selecting *Hustler* to prosecute on the ground of a constitutionally protected political cartoon which received public disapproval would be the exercise of prosecutorial discretion based upon an invidious classification. Yet a much more critical and potentially far-reaching issue is raised by maintaining that citizen disapproval of the magazine is a justifiable basis for the prosecution.

We are forced to ask whether it is any more permissible for a prosecutor to initiate charges against a presumptively protected publication — no more explicit than scores of others available in the community — merely because of vocal adverse citizen reaction, possibly of a citizen or group that does not represent the general standards of the community.* We are certain that the Court would not answer this question in the affirmative, for it would undermine this Court's decision in *Miller v. California*, 413 U.S. 15 (1973). Accordingly, petitioners strongly disagree with the argument of the United States that "since the determination of obscenity vel non turns on 'contemporary community standards of the community' [citations omitted], consideration of the public reaction to the prurient aspects of petitioners' magazine seems particularly appropriate" (Brief for the United States at 22). The Government's position is patently erroneous since, if applied, it would mean prosecuting the unpopular or irreverent publication as determined by a vocal minority, a concept foreign to the *Miller* formulation and one which would seriously undermine if not destroy the principles sought to be protected by the First Amendment.

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*Even if a "corrupt or invidious prosecutor is amenable to professional discipline and criminal liability . . ." (Brief for the United States at 11), this minor sanction matters little in the sensitive area of First Amendment expression. It is no consolation to those whose speech has been chilled in the interim years after the initial illegal exercise of prosecutorial discretion that the prosecutor may receive some form of "professional discipline."

Choosing a more well-known magazine to charge is punishing a defendant because it amounts to penalizing him for his success. Indeed, *Hustler*'s level of notoriety stems from its degree of acceptance, which is measured by the significant number of sales of the magazine in the community. Unlike the notorious tax protester, petitioners have not acknowledged the willful nature of any offense for it is their position below and in this Court that *Hustler* is not obscene but in fact is constitutionally protected.* Moreover, unlike the notorious tax protester who publicizes his willful evasion, petitioners have done nothing themselves, other than engage in presumptively protected First Amendment activities, to initiate any prosecution against themselves.

Proper Use of Prosecutorial Discretion

The evidence adduced at the hearing does not establish that the prosecution against *Hustler* was motivated by the test-case rationale. Rather, it clearly shows that *Hustler* was impermissibly singled out for prosecution above countless other publications of a similar and even more explicit nature either because of citizen reaction to a constitutionally protected cartoon or vocal citizen disapproval of the magazine's alleged "offensiveness." If such abuse of prosecutorial discretion is sustained, we will be witness to a parade of horrors where prosecutors will be given free rein to persecute those who are more vocal in voicing controversial opinions and ideas, those who have adopted a different lifestyle than that of the majority, or those who exercise their constitutional freedoms to the fullest. The prosecutor should truly have discretion in that he should not feel obliged to answer to certain segments of the

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*References by *amicus* and respondent to the contrary are based upon a statement in the trial court's decision regarding obscenity which obviously was not meant to be on the merits since the obscenity *vel non* of *Hustler* has not yet been placed in issue.

populace. However, because there exists the danger that a prosecuting official who is elected by the community views it in his best political interests to cater, consciously or unconsciously, to the expressed opinions of the vocal but perhaps minority of the electorate, we must look to the courts to check any prosecutorial discretion which is not motivated by solely legal considerations.

To be sure, a defendant alleging illegal selective enforcement of the criminal laws bears the initial burden of establishing that a prosecution was launched against him while others similarly situated of whom the prosecutor is aware remain untouched, and that the prosecutor has relied upon an illegal factor in making his decision to prosecute the defendant. But once the defendant has made his initial showing, the prosecutor cannot rebut the presumption of discriminatory prosecution by merely stating that the case in question is a "test case." The prosecuting official must come forward with evidence to support this claim, for only a *definitive* finding of test case will rebut the presumption. No such proof of test case exists on this record.

In the absence of a legally sufficient rebuttal to a defendant's claim of discriminatory prosecution, a trial court is obliged to dismiss the charges. Should a dismissal be legally mandated, however, the legitimate prosecutorial discretion, which is a cornerstone of our criminal law, will remain intact. The system that investigates and prosecutes criminal violators will not be hindered in its task — indeed, it will be strengthened, for those who are selected for the dubious honor of prosecution can feel secure, at least, that offenders of the same class and circumstances will not be passed over. The conscious discrimination by the Ohio authorities in this case in prosecuting *Hustler* alone because of disapproval of the manner in which the magazine's publishers exercised their First Amendment rights "taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the . . . action" (*303 West 42nd Street Corporation v. Klein*, 46 N.Y.2d 686, 694, 416 N.Y.S.2d 219, 223 [1979]).

Constant patrol by the courts of the zone of prosecutorial discretion will not only insure greater respect for laws which will be thus administered with an impartial eye and an even hand, it will also guarantee the unfettered exercise of First Amendment rights by all citizens. Selectivity of prosecution deserves the highest degree of scrutiny in the free speech area because controversial expression is more easily chilled than other activities. It is indefensible for a prosecutor who has selected one constitutionally protected publication or film alone (from among a group of similar embodiments of expression) because he finds the publication or film offensive or because some portion of the electorate has voiced disapproval of the material, to sustain his unconstitutional choice on the theory that it is a test case. Before the test case excuse can be found to rebut the presumption of illegal selective enforcement which a defendant has established, the prosecutor himself must adduce credible evidence that he has laid the groundwork for the subsequent prosecutions and adduce corroborating proof that the challenged prosecution is indeed the first, not the first, last, and only. Only when this evidence is brought forth can we be certain that the prosecutor has not overstepped the boundaries of his office. And only when courts refuse to sanction the improper singling out of one offender, chosen on an impermissible factor, can every citizen feel confident that the freedom to exercise his constitutional rights will remain unabridged.

Conclusion

In urging reversal of the judgment below, petitioners look to this Court merely to apply its own time-honored and well-honed doctrine of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which has become the sanctuary of the controversial, the outspoken, the philosophically unpopular, and all those "different" people or groups against whom a prosecutor may be tempted to exert the power of his office. Of course, a prosecuting attorney can legitimately exercise a certain amount of discretion with respect

to the cases he selects so long as his conscious bypassing of certain wrongdoers and the singling out of others is not based upon consideration of such factors as race, religion, or the extent to which the chosen violators are politically or morally unpopular for the vocal or notorious exercise of their constitutional rights. A condemnation of these unconscionable prosecutorial practices will in no way impair or impede the exercise of legitimate prosecutorial discretion or result in unwarranted dismissal of criminal complaints against culprits merely because some other miscreant was not similarly charged, for reasons wholly rational and unrelated to the doctrine of illegal selective enforcement.

Petitioners established through the cross examination of the Cleveland official imbued with the authority to determine the obscenity cases to prosecute that (1) their publication was the only such magazine selected for prosecution, and more than four years following the initial charge, remains the single publication of its type (national men's magazine with second class mailing privileges) to be so charged; (2) the prosecutor was well aware of other similar magazines but no police action, not even the most preliminary in nature, was taken against these similarly prominent alleged violators; and (3) *Hustler* was singled out because of community disapproval of a constitutionally protected cartoon which had caused citizen complaints to the police, who in turn relayed this community disapproval to the prosecutor. Upon unequivocally establishing these facts, petitioners had presented a *prima facie* case of illegal discriminatory prosecution mandating, in the absence of rebuttal evidence, the dismissal of the charges. Since the trial court properly rejected respondent's tenuous and unsupported claim that the *Hustler* prosecution was a test case, the trial court's judgment must be reinstated.

Such corrective action by the Court is thoroughly justified by the record below and the authorities cited herein. Moreover, it

will act as yet another reaffirmation of *Yick Wo, supra*, which statement seems sorely needed in these times when the outspoken practitioner of First Amendment free expression is too often the scapegoat of the police and prosecutor. Not only will strict adherence to the rule benefit the controversial public figures wrongly singled out on invidious grounds, it will provide a standard by which all men and women charged can measure the conduct of the prosecutor. Once this Court refuses to condone the illegal enforcement that occurred below, we are confident that prosecutors across the land will take the necessary care in the exercise of their potent power to ensure that the laws which affect the lives of ordinary citizens will be enforced evenhandedly. A byproduct of this new prosecutorial caution will be a greater respect for law enforcement in general. Moreover, once prosecutors abide by the rule prohibiting selection of a certain defendant based upon an invidious factor, the incidence of necessary but sometimes time-consuming defense-requested hearings on selective prosecution grounds should abate.

Nevertheless, the substantive rule urged here would permit one in the position of petitioners to establish his illegal selection, thereby rightfully shifting the burden to the state or federal government to rebut the initial showing of illegal motive. This is as it should be since the prosecutor's knowledge and reasoning is exclusively within his control. Petitioners made their requisite showing, unrebutted by the state, only to find that an appellate court disobeyed the most fundamental rules of appellate review and refused to accept the findings of the trial court.

We are confident that this Court will read the record with no preconceived notions, as apparently did the appellate courts below, and sustain the trial court's determination, thus rendering impossible the prosecution of one who has been selected with the prosecutorial "uneven hand" and "evil eye."

For all the foregoing reasons and authorities, those set forth in petitioners' opening brief and those to be presented at the time of oral argument, it is respectfully requested that the judgment below be reversed and that of the Cleveland Municipal Court be reinstated.

Respectfully submitted,

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